

A Romanistic Approach on Unified European Private Law

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Current times have to some degree changed the roles of those of us involved in historical–legal research. The scope of our studies is still the same — its limitations are determined by the existent sources of knowledge — yet the same can not be said of the scope of our reflection. Nowadays our gaze is often directed towards the new legal reality which is being built in the old Europe.¹

This article is inspired by three European Parliament Resolutions which attempt to influence the progressive unification of Private Law in the new united Europe have been the impetus for what follows.

The first Resolution, from May 26, 1989, encouraged the Member States of what was then the European Community towards harmonization of Private Law, including the drafting of a “Common European Code in Private Law.”² To date this effort has encountered several obstacles both from inside and outside of the various national Governments, in contrast to significant

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¹ See, for example, CANNATA, *Usus modernus pandectarum e diritto europeo*, in *SDHI* 52 (1986) 435 ff.; ID., *Usus hoderuns pandectarum. Common Law, diritto romano olandese e diritto commune europeo*, in *SDHI* 57 (1991) 383 ff.; CASSAVOLA, *Diritto romano e europeo*, in *Labeo* 40 (1994) 161 ff.; GIARO, *Römisches Recht, Romanistik und Rechtsraum Europa*, in *Ius Commune* 21 (1994) 1 ff.; KNÜTEL, *L'unité du droit en Europe et le droit romain*, in *Revue d'histoire des Facultés de Droit et de la science juridique* 19 (1998) 125 ff.; VALENTINO, *Romanistica e codice civile, spunti per l'analisi di uno storico connubium*, in *Labeo* 41 (1995) pp. 181 ff.; WACKE, *Die Rezeption römischen Rechte in Europa. Ein einführender Überblick*, in *Orbis Iuris Romani* 1 (1995) 143 ff.; ZIMMERMANN, *Diritto romano e unità giuridica europea*, in *Studi di storia del diritto* I (Milano 1996) 3 ff.

² OJEC, 26th June 1989, No. C. 158/400 ff.

progress which has been made in the scientific field. Thus in 1990, the Italian city of Pavia hosted a conference under the auspices of Professor Gandolfi, to examine the possibility of drafting a "European Code of Contracts" based on Book IV of the Italian Civil Code of 1942, one of the European legal texts which most clearly influenced by Roman Law. This project, carried out by the Academy of European Private lawyers, already has a palpable result: the *European Contract Code. Preliminary draft* (Milano 2001).³ In a similar vein, and likewise thanks to another academician, Briton Harvey McGregor, a "Code of Contracts" was produced, its principal merit being the harmonization of the Anglo-Saxon and the continental traditions, not surprisingly the study of this topic took place in the United Kingdom where Scottish Law has a distinctive Roman imprint.⁴ There has also been a group working in Trento since 1995, directed by Mario Bussani and Ugo Mattei, on a so-called "Common Core" of European private Law, seeking to strengthen the idea of a common legal culture, on a level far removed from any possible code.⁵

The second Resolution, from May 6, 1994, follows the same path, but additionally endorses the so-called "Principles of European Contract Law", produced by the "Lando Commission."⁶ This Commission, which began operation in 1980, is made up of jurists predominantly of Romanist training, from each Member State of the then European Community. This "Commission on European Contract Law" has already published a part of its works⁷, and its work is part of

³ On the implications of a project of this type see HARTKAMP, HESSELINK, HONDIUS, JOUSTRA, PERRON (eds.), *Towards a European Civil Code*, 2nd. ed. (Nijmegen 1998)

⁴ MCGREGOR, *Contract code: drawn up on behalf of the English Law Commission* (Milano 1993)

⁵ See BUSSANI, MATTEI (eds.), *The "Common Core" of European Private Law. Essays on the Project* (The Hague-London-New York 2002)

⁶ OJEC, 25th July 1994, No C. 205/518 ff.

⁷ LANDO, BEALE (eds.), *Principles of European Contract Law. Parts I and II* (The Hague 2000)

UNIDROIT, a United Nations organisation to promote the unification of Private Law.⁸

The third Resolution, from November 15, 2001, differs from the others in two aspects: first, it is a realistically delimited undertaking, as it is limited to contract law. Second, the Parliamentary debates producing this resolution flowed from findings of a European Commission that invited the Parliament to consider various different options to address the diversity of private Law in Europe. These options ranged from changing nothing to creating *de novo* a complete Law of contracts for the European Union.⁹

The Parliament, on that political basis, eventually decided to pursue the elaboration of a European juridical statute that would be offered for approval to the international community. With such a goal it constitutes the European juridical institution, and projects an ambitious calendar by which normative harmony would apply starting from 2010. Striving for coherence between declaration and performance, this same Commission has initiated a Plan of Action in the year 2003.¹⁰

In any case, the standardization of European Private Law is today being carried out via Directives and Rulings which affect the regulation of the targeted issues in national legislation, and thus avoids the pitfalls inherent in pursuing a Common Code. This “harmonization” — from top to bottom — has taken place primarily in the areas of Consumers Protection Law; Intellectual Property; and some types of commercial contracts, such as agency and insurance, and in the area of corporate entities law.¹¹

⁸ On the work of this organism, see BONELL, *A new approach to international commercial contracts: the UNIDROIT principles on International Commercial Contracts: XVth International Congress of Comparative Law* (The Hague 1999)

⁹ OJEC, 13. June 2002, No. C. 140/538 ff.

¹⁰ June Communication from the Commission to the European Parliament and the Council. *A more coherent European contract Law. An action plan.* COM (2003) 68 final. OJEC, 15. March 2003, No. C. 63/1 ff.

¹¹ See CÁMARA LAPUENTE, *Hacia un Código civil europeo: ¿realidad o quimera?*, in *LA LEY. Revista jurídica española de doctrina, jurisprudencia y bibliografía* (5th March 1999) 1 ff.

Much has been said about the expression of Roman Law in European Law, mostly in pompous and arrogant terms. Usually such affirmations represent one of two intents: the attempt to endow a rule or a current legal opinion with a certain historical justification, or the attempt to endow the study of Roman Law with a certain current justification.

In the first case effort is unnecessary, as the legally binding nature of positive Law in democratic countries rests not on tradition but on popular sovereignty. Affirmations of Roman Law are therefore redundant arguments to bolster the legitimacy of the prevailing Law, irrespective of how parsimoniously the latter may comply with its historical predecessors. After the French Revolution, on the other hand, Law was identified with "*the Law*," setting aside doctrinal and jurisprudential tradition in the interest of greater legal certainty. These ideas which took form in the Constitutions and codifications of the nineteenth century permeate most European societies.

In the second case, when we allude to the connection between Roman Law and Modern Law in order to defend the cultivation of the former, reactions may be altogether different.

The most radical opinion which we found regarding the value of Roman Law in relation to the European legal tradition was that expressed by Mommsen (1837–1903) in a famous lecture he gave in Zurich in 1852. The great historian and jurist made some statements on this occasion which deserve explanation so that they might be properly understood, and which are related to the time and place where these opinions were proffered¹²: the mid nineteenth century in the part of Switzerland which borders Germany. Mommsen declared that to justify the study of Roman Law by suggesting that it was the most perfect piece of legislation which ever existed was banal, but perhaps useful if we knew no other reasoning to defend our discipline. Roman Law was not perfect – Mommsen continued – we need only study Criminal Law or Roman Mortgage Law to see that he was quite right. But there is more. This eminent historian and jurist declared that Roman jurists were not superior to their contemporary German counterparts, and that

¹² MOMMSEN, *Die Bedeutung des römischen Rechts*, in *Gesammelte Schriften* III, 3.^a ed. (Zurich 1994) 59 ff.

the grandeur of Roman Law was due to the combination of its national origin and its later universal development.

The explanation for these strident affirmations which, on the one hand, completely demystify the intrinsic importance of Roman Law, shifting the emphasis to its later development, and, on the other hand, diminish the work of classical Jurisprudence, should be sought in the political and historical context in which they were expressed. Regarding the first question we need to make it clear that in the middle of the nineteenth century Germany was a new nation growing rapidly and that Mommsen's intention was to clear the way towards the construction of a common Law, on a Roman basis, for all the German-speaking peoples. Secondly, the comparison between Roman Jurisprudence and nineteenth century German jurists, who at the time boasted the greatest prestige in the science of Private Law when compared with their French and Italian counterparts, was a clear sign of the pride of the German legal class. They had some justification.

Today, the study of the European legal tradition is an important part of our work, at least from a pedagogical perspective, witness the focus of the core curriculum in the latest version of our Course Syllabus in Spain: "Law in Rome and its reception in Europe", which obliges us to reflect upon this European legal tradition.

Without going into great detail as to whether Roman Law has sufficient merit on its own or as to whether the latter depends on its impact on the former in contemporary European Law, one could start with the following reflection: Roman Law – in d'Ors' famous expression – is the "humanities of the jurist," and in today's climate, dominated by pragmatism, any amount of support in defense of humanistic studies is doomed to fall short.¹³ If, moreover, legislation concerning the Course Syllabus gives special relevance to the European reception of Roman Law, it is clear that we should not turn our backs on this very real part of our which is, if not the cornerstone, one of the pillars which support our actual survival.

¹³ d'ORS, *Jus Europaeum?*, in *L'Europa e il diritto romano. Studi in memoria di Paolo Koschaker* (Milano 1954) 467 f.

Once we recognize the importance of Roman Law and Roman legal tradition in Europe¹⁴, we need to ask ourselves what influence it should bear upon current European Private Law, which is poised to become another constituent part of the European Union. In other words, what does Roman Law have to do with the new legal supranational map which we intend to draw?

From the Treaty of Rome (1957) to the treaties of Maastricht (1992), Amsterdam (1997) and Nice (2001), there has been talk of the “process of European construction”, a process which began with the creation of a Single Market without barriers, and institutions of a political and eventually legal nature on a supranational basis. The development of the market and exchanges of resources encounter serious obstacles to this day due to the differences between national corpora of legislation. As a result, there is a perceived need to have recourse to a renewed *ius commune* in Private Law as well, which would replace the various national Laws and alleviate the differences disuniting the legal corpora of the different EU member states, differences which are in any event mainly formal rather than substantive.

Its principles are already beginning to take shape. Similarly as occurred in the Early Middle Ages, they are presently influencing national legislation, making way toward a new European legal culture. In this new European legal culture jurisprudence is re-emerging as a determining factor, and at the same time, and to the surprise of many people, the Roman tradition is also flourishing once again. We believe that this state of affairs is due both to the fact that the civil codifications represent a legal system with a legislative inclination showing the imprint of their historic development from a Roman legal past, and also to the jurisprudential basis of the Anglo-Saxon legal system.

These common substrata are reflected in a single discrete conception of Law — distinct from religion, morality or ideology — in the institutions of Private Law, in the assumption of the same logical-legal schema and in the already-mentioned presence of jurists in Western society. Consequently, Roman Law is one of the main threads of the tapestry connecting the

¹⁴ See, for example, VAN CAENEGEM, *European Law in the Past and in the Future. Unity and Diversity over Two Millennia* (Cambridge 2002)

various systems of Private Law in force in Europe. It seems reasonable to think that if some day there exists a unified Private European Law, it will focus its attention, consciously or unconsciously, on Rome and on Roman law, not necessarily as a model for specific institutions — it would for example be absurd to resurrect such institutions as Quiritarian Property, which was absolute and fiscally immune and was the exclusive right of one part of the population — but rather for the example of its schema and its rules. This old idea of a European Law with a Roman basis has even been branded as “separatist” with regard to other peoples of the world who are, culturally speaking, also European. As early as 1954 d’Ors spoke of a “new *ius gentium privatum*” in Jurisprudence, based on the common training of jurists in the technical foundations of Roman Law, rather than on any resurrection of the Justinian *Corpus* as the prevailing Law.¹⁵

It is not so hypothetical or utopian today as it was in 1954 to speak in these terms. Insulated from the concrete problems of the current world, the International Institute for the Unification of Private Law (UNIDROIT) is facilitating efforts to consolidate universally applicable standard principles, especially in the field of international business. The effective application of this set of norms still depends, of course, on the will of the individuals or companies, and on their ability to face potential legal conflict: if these individuals fail to submit themselves to arbitration, the efficacy of the principles will depend upon their expression in the National Law by which the individuals seek to resolve any controversy.¹⁶

With regard to the European Union and to hypothetical, but ever nearer, unification of Private Law, we shall now mention the conclusions of a recent article by the Spanish mercantilist, Jesus Alfaro. His opinion, albeit conservative, is nonetheless interesting, and can be summarized in the following terms: the international unification of Private Law is not an asset in itself; and legislation is not the best means of implementing it, especially when all the national European pieces of legislation already share a common substrate, representing respect for

¹⁵ ID., *Jus Europaeum?* cit., 472.

¹⁶ About these principles, see, ALVARADO (et al.), *Comentario a los Principios de Unidroit para los contratos del Comercio Internacional* (Pamplona 1999)

private property and contractual freedom.¹⁷ Alfaro uses these two premises as his point of departure, outlining the advantages and disadvantages of unification. Amongst the latter, national pieces of legislation would stop struggling to be more attractive than one another to their economic partners. With this loss of competition, quality would also be lost. As a result, legal standardization would have to restrict itself to imperative norms and not affect the non-imperative ones, which the national legislator simply drafts, rather than competing with other legislators or international organizations.

In any event, we hope that any private legal system the new Europe will design will be based on Law rather than on Economics, for the sake of big business as well as for its effect on citizens' daily lives. This standard European Private Law should be simple, as Roman Law was; and if it is to prosper and make itself into a new *ius commune*, it will need to avoid clashing with the legal tradition of the national pieces of legislation. It has been a long time since Roman Law was valid *ratione imperii*, but new paths are being laid for its renaissance *imperio rationis*.¹⁸

We must not neglect to emphasize that Roman Law was severely attacked by the Nazis as being the expression of Western Law, and the framework of the economic systems of free Europe. This was reinforced by the notions that it was a Judaizing Law and that the reception of Roman Law was a direct outrage against the legal identity "patria." This was an expression of hypertrophic nationalism, present in Germany since the nineteenth century. As a consequence of all of this, point number 19 of the National-Socialist Party Program declared: "We demand that Roman Law, which serves a materialistic world view, be replaced by a common German Law". This was directed against the 1899 Civil Code, which the Nazis viewed as heavily Romanized.

¹⁷ ALFARO, *La unificación del Derecho privado en la Unión Europea: planteamiento*, in *Boletín Europeo de la Universidad de la Rioja* 5 (Agosto 1999, suplemento) 6 ff.

¹⁸ See generally KNÜTEL, *Rechtsteinheit in Europa und römisches Recht*, in *Zeitschrift für Europäisches Privatrecht* 2 (1994) 244 ff.; ID., *Derecho romano y codificación del Derecho civil*, in *Revista de Derecho Privado* 6 (1995) 65 ff.; ID., *Derecho romano y ius commune frente a las Cortes de la Unión Europea*, in *Roma-América. Diritto romano commune* I (1996) 40 ff.